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No. 88-

IN THE SUPREME COURT OF THE UNITED STATES

October term, 1988

KEITH PATILLO,

Petitioner,

-v-

STATE OF GEORGIA,

Respondent.

Supreme Court, U.S.
FILED
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PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

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SUPREME COURT, U.S.

GARY A. ALEXION
88 Walton Street, N.W.
Atlanta, Georgia 30303
(404) 623-6201

WILLIAM H. HUGHES, Jr.
RANDALL L. ALLEN
TODD R. DAVID
ALSTON & BIRD
35 Broad Street
Atlanta, Georgia 30335
(404) 586-1500

ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

1. Whether the affirmance of petitioner's death sentence on the grounds that a Giglio violation committed in the capital sentencing phase was harmless error should be summarily reversed or vacated and remanded for further consideration in light of the Court's recent decision in Satterwhite v. Texas, 108 S.Ct. 1792 (1988).

2. Whether petitioner's death sentence should be summarily reversed or vacated and remanded for further consideration because the Georgia Supreme Court failed to require the prosecution to prove beyond a reasonable doubt that a Giglio violation involving only the capital sentencing phase was harmless error.

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No. 88-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

KEITH PATILLO,

Petitioner,

-v-

STATE OF GEORGIA,

Respondent.

OPINION BELOW

The opinion of the Georgia Supreme Court affirming petitioner's conviction and sentence of death is reported at 258 Ga. 255, 368 S.E.2d 493 (1988) (App. A).

JURISDICTION

The judgment of the Georgia Supreme Court was entered on May 27, 1988 (App. A). By order dated July 19, 1988, Justice Rehnquist granted petitioner an extension of time in which to petition for a writ of certiorari to and including August 25, 1988 (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part as follows:

> nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 17-10-31 of the Official Code of Georgia Annotated provides in relevant part as follows:

> Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. . . .

Section 17-10-30 of the Official Code of Georgia Annotated provides in relevant part as follows:

> [b] In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravated circumstances which may be supported by the evidence. . . . (emphasis added).

STATEMENT OF THE CASE

I. Introduction.

Petitioner Keith Patillo ("Patillo") received the death sentence for the beating murder of a young woman in Macon, Georgia.[1/] He was twenty-one years old at the time of the murder and had no prior record of violence. In the capital sentencing phase of the trial, petitioner argued that the murder was the product of his abuse of alcohol and drugs on the night in question. Only one prosecution witness testified in the sentencing phase, David Chatman ("Chatman"), an inmate who was on petitioner's cell block while he was awaiting trial.

Chatman was the sole witness who suggested an explanation for the murder other than substance abuse, and who supported the prosecution's argument that petitioner posed a continuing threat of violence. As the prosecution later stated

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1/ Petitioner does not concede that he was properly convicted of malice murder or that aggravating factors supporting the death penalty existed. Those issues, however, are not raised in this petition.

in a letter to the Board of Corrections, "Mr. Chatman's testimony . . . proved to be crucial during the sentencing phase of Patillo's trial."

Chatman's testimony constituted a violation of petitioner's Due Process rights for the following reasons: (1) Chatman had an agreement with the prosecution in exchange for his testimony; (2) upon petitioner's motion, the trial court had entered an order requiring that all existing or future "Giglio deals" be revealed;[1/] (3) the prosecution did not reveal its deal with Chatman; (4) at trial, the prosecution elicited false testimony from Chatman that no such deals had been made and did not correct that testimony; and (5) the prosecution's closing argument expressly relied upon Chatman's testimony to counter petitioner's plea for life imprisonment and to suggest that he would be dangerous in the future.

The Georgia Supreme Court held that a Giglio deal had been made with Chatman but concluded that his testimony was not material and that, therefore, the failure to reveal the deal was harmless error. That decision, however, was issued before this Court decided Satterwhite v. Texas, 108 S.Ct. 1792 (1988), and thus lacked Satterwhite's guidance as to harmless error analysis in capital sentencing proceedings. Contrary to Satterwhite, the Georgia Supreme Court failed to consider the issue in light of a capitol sentencing jury's unfettered discretion to issue a life sentence notwithstanding the presence of aggravating factors.[2/] The Georgia Supreme Court also failed to apply the "harmless beyond a reasonable doubt" standard, which controls where, as here, the prosecution uses or fails to correct false testimony.

1/ See Giglio v. United States, 405 U.S. 150 (1972).

2/ Coleman v. Kemp, 778 F.2d 1487, 1541 (11th Cir. 1985), cert. denied, 476 U.S. 1164 (1986); Moore v. Balkcom, 716 F.2d 1511, 1521-22 (11th Cir. 1983), cert. denied, 465 U.S. 1084 (1984); Zant v. Stephens, 250 Ga. 97, 297 S.E.2d 1 (1982).

This Court should summarily reverse or vacate and remand petitioner's death sentence for further consideration to correct these errors before years of needless and costly appeals take their toll on the system and on petitioner.

II. Facts and Proceedings Below

Petitioner Patillo was indicted for murder by a Bibb County, Georgia grand jury during the August term of 1986. The victim was an acquaintance of Patillo, Stephanie McLamb ("McLamb").

At trial, the evidence showed the following:

Patillo and McLamb first met in a public park on or about August 16, 1986. On August 22, 1986, Patillo picked up McLamb at her residence for a date, and they then drove to the home of Lisa Wilkes ("Wilkes"). Wilkes was McLamb's best friend, the daughter of a local deputy sheriff, and the niece of a local sheriff.

There was undisputed evidence of Patillo's drug and alcohol use on the night of the murder. Wilkes testified there was a 12-pack of beer in the back of Patillo's car when she entered it. At one point in the evening, Patillo, McLamb, Wilkes and a man known as "Boo-Boo" went to a local school yard, where they passed around a few marijuana cigarettes and drank beer. Patillo, McLamb, and Wilkes later left the school yard, purchased additional beer, and drove around town in Patillo's car until approximately 10:30 p.m. At that time, Patillo drove Wilkes to her residence, and Patillo and McLamb drove off together.

The murder ocurred in a wooded area near a public park in Macon, Georgia. The defense argued that Patillo and McLamb had consensual sexual relations and that, at some point, Patillo's car became mired in mud. According to the defense, McLamb had threatened to accuse Patillo of rape because his delay in returning her home would force her to violate her curfew and cause trouble with

her family. Patillo, who was intoxicated, then lost control and repeatedly struck McLamb with a baseball bat. This version of the murder was substantiated by out-of-court statements made by Patillo and offered by the prosecution in the guilt-innocence phase of the trial.

The prosecution argued that the evidence was consistent with rape because, inter alia, the field in which the murder occurred was "mosquito-infested." Patillo was not, however, charged with rape and that issue was not submitted to the jury as a potential aggravating factor supporting the death penalty.

The jury found Patillo guilty of malice murder, and the capital sentencing phase followed. As noted above, Chatman[4/] was the only witness who testified for the prosecution in the capital sentencing phase. The defense, on the other hand, offered several witnesses and argued that (1) the murder was incongruent with Patillo's general behavior and was caused by his use of drugs and alcohol on the night in question; and (2) Patillo was not likely to be violent in the future.

To support these arguments, the defense called Dr. Pat Cleveland, a psychologist who had interviewed Patillo and individuals familiar with his prior behavior. As to Patillo's general disposition, Dr. Cleveland testified that those she interviewed felt Patillo "was very passive and quiet." (Trial Transcript at 531-32 (hereinafter "TT")).

Dr. Cleveland also testified on the critical issue of future dangerousness.

> Q. All right. Let me back up. Should his age be considered as a factor? In other words, from your studies, do people become less prone to commit violent acts as they grow older?
>
> A. Yes, they do, male in particular.
>
> . . . . I'd like to refer to my notes. This is from the Source Book of Criminal Justice Statistics, 1984. From age 21, which is Mr. Patillo's age right now, to age 40, there's about a 75% drop in the amount of violence that occurs.
>
> . . . .
>
> I pointed out in my report that when a person does not have a history of violent behavior and a violent act occurs, what happens after that violent act is very important in determining whether that violent act or a similar act would occur again at another time and a lot of research backs up the fact that if there's punishment, if there is some change in behavior as a result of that violence, . . . that in itself decreases the likelihood that violence would occur again. When violence goes undetected, then there's a real high probability that it will occur again. But if something happens as a result like getting arrested, being in jail, being tried, being sentenced, all those are factors that significantly change the probability of his behavior.

(TT at 530-31.) Dr. Cleveland also cited "Patillo's highly intoxicated state" as a mitigating factor. (TT at 530.)

The defense offered several other witnesses, including Patillo's former foster parents and friends who testified as to his character and family history. Although there was testimony regarding violence in Patillo's family, the defense witnesses testified that Patillo was not violent.[5/] Similarly,

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4/ The record in the case at times erroneously refers to David Chatman as David Chapman.

5/ Barbara Clark, the mother of one of Patillo's friends, said she had never seen Patillo act violently. (TT at 463.)

Patillo's friend Diane Baker testified that Patillo "was like a normal man. He never used no bad language to me or nothing was bad about him." (TT at 470.)

Ezekial Redding, Diane Baker's father, testified, as follows:

> Q. At any time did Keith portray to you an aggressive type of personality or like a bully? Did he ever display any violence in your house?
>
> A. No, sir, never has.
>
> Q. Did he ever threaten anybody in your house?

[Footnote 5/ Continued On Next Page]

although Patillo had twice been arrested for minor offenses, he had no record of violence.

Chatman contradicted this testimony. His testimony suggested that, rather than having simply lost control because of alcohol and drug use, Patillo was motivated by a violent hatred of women. Chatman described an alleged jailhouse conversation with Patillo as follows:

> Q. Did he ever tell you how he felt about women in general?
>
> A. Yes ma'am. He said he hated women.
>
> Q. Did he say anything else about that?
>
> A. You mean as to the reason he hated them?
>
> Q. That's correct.
>
> A. Yes, ma'am. He said when he was small his stepmother, I guess his father was married twice, and his stepmama turned his daddy against him. She sent him

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3/ [Continued]

> A. No.
>
> . . . .
>
> Q. Did anybody ever beat up Keith Patillo and he didn't fight back?
>
> A. A fight happened around the back of my house one morning.... somebody had beat him up around there, and he said he just turned around and walked off 'cause he wasn't fighting nobody.'

(TT at 481-483.)

Paula Brandon, a long time friend of Patillo, testified that "Keith has always been very sensitive and very -- He could be emotional, which I don't know, it had its good points about that though.... Keith wasn't violent at all." (TT at 488-89.) Ms. Brandon felt that alcohol and drugs must have contributed to the murder. (TT at 490.)

Nancy Pafford, who had been Patillo's foster mother, testified that he had been the quietest of her 32 foster children. In her words, "he never gave us any trouble." (TT at 497-98.) She felt that his display of violence and use of alcohol and drugs was not typical -- "It couldn't be Keith. That's just not the way he acted." (TT at 500.)

Another former foster parent of Patillo, James E. Gillis, stated that Patillo had never shown any violent tendencies and had "always respected me." (TT at 515-16.)

> off to a school in Alabama and while he was gone they adopted a little girl by the name of Donna and he said that his stepmother talked his daddy against him. He wouldn't let him stay with them anymore and they, you know, showed the little girl, Donna, more attention than they did him, and on one occasion . . . [his stepmother] was trying to embarrass him and he said, you know, he hated her for that. . . .
>
> Q. Did he ever tell you what his feelings were that night when he killed Stephanie?
>
> A. He said he had nothing in him but hatred from constant hostility that he had had I reckon since he was young, things, you know, that he was going through with his stepmother. He said at that particular time, that particular night, he said if anybody would have walked up on him, he probably would have killed them too.
>
> Q: Did he ever mention anything else to you about his stepmother?
>
> A. He said that she was lucky that he hadn't done something to her. He had cut, you know, four of her car tires at one time because she cut his bicycle tire for something, but he said she was lucky that he hadn't done something to her because he hated her.

(TT at 443-445.)

The prosecutor explicitly relied on Chatman's testimony in arguing against a life sentence based on mercy or the prospect that Patillo would not be violent in the future.

> Well, they say give him life in prison. You know, there are a lot of people that work in prison. There are not just inmates in prison. They have counselors, teachers, some women in prison, and we know he hates women. Are we going to give him a chance to beat another woman to death? Are we going to give him a chance to beat a prison guard to death? We've got to save their lives. Are we going to give him a chance to beat his stepmother because he says she's lucky that he hasn't done the same thing to her.

(See TT at 548.) This argument undoubtedly carried significant emotional impact--especially since eight of the twelve jurors were women.

At trial, in response to the prosecutor's specific questioning, Chatman acknowledged that he was currently

incarcerated for a probation violation, but he denied the existence of any deal.[6] Defense counsel attempted to impeach Chatman based on his prior criminal record, but had no knowledge of the deal between Chatman and the prosecution, and no basis upon which to impeach his motive for testifying in this case.[7] Thus, to the jury, Chatman appeared as a man driven by altruism, a man willing to incur the wrath of his fellow inmates.

Subsequent events refuted Chatman's denial. After petitioner had appealed his conviction and death sentence to the Georgia Supreme Court, Chatman wrote a series of letters claiming that the prosecution had reneged on an agreement to reinstate his probation. In one such letter, Chatman stated:

> [T]he D.A.'s office promised to get my probation reinstated in return for my testimony against Keith Patillo, because I never would have done it if they hadn't, especially knowing I'd already been sentenced to prison.

(NTT at 143.)

Another letter explained in detail Chatman's fear of being in prison after testifying against Patillo

> The deal was made at that very first meeting, because I told them that unless I got that prison sentence off my shoulder, I could not testify. I explained that I'd only be putting my life up for grabs if I did that. . . an ex-Policeman and a Snitch don't stand a possible chance in prison, because the other inmates will be on them like a dog on a bone. [The prosecutors] contend[] that no deal was made, but try putting yourself in my shoes for a moment.
>
> If you knew you already were going to prison would you testify against someone that you knew was going too? I knew Keith would get some kind of conviction, if not the death penalty. Would you jeopardize your life like that? If [the prosecutors] had an act of congress at that time, I would not have testified. I would not put my . . . life on a limb.

(NTT at 150.) These letters prompted a remand, upon joint motion, from the Georgia Supreme Court to the trial court for a hearing on a motion for a new trial.

At that hearing on August 11, 1987, the initial letter Chatman had written before trial offering to testify against Patillo was introduced. This letter outlined the content of his potential testimony but, significantly, made no reference to Patillo's alleged hatred of women or potential for future violence.

The letter also made clear Chatman's motive for testifying:

> I realize that you're going to say that the District Attorney's office can't make deals, but I also know why you say that. However, I was sentenced Dec. 18, 1986 to serve about 34 months for violating probation. I wants [sic] to get my probation reinstated and continued, or either dropped altogether. I want to get out as soon as possible so that I can support my family.

(NTT at 127.)

This initial letter further explained that Chatman had exchanged testimony for consideration from the same District Attorney's office in 1985, when he testified against David McCrary in a rape prosecution. Chatman was also in jail at the time he testified against McCrary, and in his view, that testimony led to his release on time served and probation. (NTT at 152.) Apparently, Chatman wanted to repeat that experience by having the prosecution intercede on his behalf with Judge Walker Johnson, who had revoked his probation, and who had also handled the McCrary case.[8] In Chatman's words,

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[6] The testimony on this point was straightforward:

[Prosecution]: Has the State made any deals to get you to testify in this case?

[Chatman]: No, ma'am.

(TT at 442.)

[7] Shortly before trial, the defense renewed its previously-granted "Motion to Reveal the Deal," and the prosecution responded by again denying the existence of any deals.

[8] Judge Johnson did not preside over Patillo's trial.

"[w]hen I testified against McCrary . . . it worked out fine. I got what I asked for." (NTT at 149.)

At the hearing on the motion for new trial, Chatman again changed his story. Contradicting both his trial testimony that no deal existed and his letters stating that a deal had been breached, Chatman steered a middle course. He maintained that the letters charging breach by the prosecution were fabrications written after he learned that his probation would not be reinstated and began to fear for his life. The truth, he now said, was that although he sought a promise to reinstate his probation, the prosecution refused to make a binding commitment. Instead, according to this third version of the agreement, the prosecutors agreed to make Chatman's cooperation known to Judge Johnson and leave the decision to him. Under this version, the prosecution did not promise to make an explicit recommendation and warned Chatman that his prior record might prevent his release.

Although Judge Johnson eventually declined to reinstate probation, one of the prosecutors testified that she did in fact consult Judge Johnson on Chatman's behalf.

> I said this is David Cha[t]man's record. As you can see, he's forgeries and theft, nothing violent. I did mention that and then I said . . . he testified for the State in the Keith Patillo trial. I said -- and Judge Johnson --- was the Judge that sat on the David McCrary case. So he remembered David Cha[t]man and I refreshed his memory in that particular case; and I said, . . . Mr. Cha[t]man would like his probation reinstated for what he has done. I said, I am not asking you to do that Judge, I'm in no position to do that and I'm not going to do that. All I'm doing is relaying his desire to you, but I also want you [to] know everything that there is to know about David Cha[t]man to help you make your decision. . . .

(NTT at 105.)[3/]

3/ Judge Johnson did agree to sign a letter along with the prosecutor requesting that the Board of Corrections transfer Chatman to a lower security prison. That transfer occurred after Chatman wrote his post-trial letters but before he testified at the motion for new trial hearing.

By order dated September 21, 1987, the trial court denied petitioner's motion for a new trial, and on May 27, 1988, the Georgia Supreme Court affirmed petitioner's conviction and death sentence. Patillo v. Georgia, 258 Ga. 255, 368 S.E.2d 493 (1988). The Georgia Supreme Court rejected the prosecution's argument that the arrangement with Chatman did not qualify as a "deal" under Giglio. Thus, it held that, even under the third and final version of the facts, the arrangement with Chatman should have been revealed to petitioner and the jury. Nonetheless, the Georgia Supreme Court did not order a new sentencing hearing because it concluded the Giglio violation was harmless error. As demonstrated below, the Georgia Supreme Court's analysis and holding are plainly incorrect under both Satterwhite and Giglio.

REASONS FOR GRANTING THE WRIT

I. CONTRARY TO SATTERWHITE, IN DECIDING THE GIGLIO VIOLATION WAS HARMLESS, THE GEORGIA SUPREME COURT DID NOT CONSIDER A CAPITAL SENTENCING JURY'S DISCRETION TO RECOMMEND A LIFE SENTENCE NOTWITHSTANDING THE PRESENCE OF AGGRAVATING FACTORS.

The applicability of harmless error analysis to capital sentencing hearings has vexed the courts. For example, in Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669 (1986), the Court vacated a death sentence because certain allegedly mitigating testimony was excluded in a capital sentencing hearing. Finding a constitutional violation, the Court held that it could not

> confidently conclude that credible evidence that petitioner was a good prisoner would have had no effect upon the jury's deliberations. The prosecutor himself, in closing argument, made much of the dangers petitioner would pose if sentenced to prison . . . . [I]t appears reasonably likely that the exclusion of evidence bearing upon a petitioner's behavior in jail (and hence, upon his likely future behavior in prison) may have affected the jury's decision to impose the death sentence. Thus, under any standard, the exclusion of the evidence was sufficiently prejudicial to constitute reversible error.

476 U.S. at 8.

In Satterwhite v. Texas, 108 S.Ct. 1792 (1988), the Court held that harmless error analysis under the Chapman standard may be applied to capital sentencing proceedings. Id. at 1798; see Chapman v. California, 386 U.S. 18 (1967). Thus, where a constitutional error affects a death sentence hearing, a new hearing is required unless "the beneficiary of [the] constitutional error [can] prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id. at 24.

Satterwhite further instructs that great caution must be used in applying the Chapman harmless error test in this context:

> It is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer.

Satterwhite, 108 S.Ct. at 1798.

In light of this concern, the Court reversed Satterwhite's death sentence, even though it was supported by sufficient evidence. Writing for the Court, Justice O'Connor explained that

> [t]he question . . . is not whether the legally admitted evidence was sufficient to support the death sentence, which we assume it was, but rather, whether the State has proved "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."

Id. (quoting Chapman, 386 U.S. at 24).

Satterwhite's teaching regarding the "discretion factor" in death penalty cases is especially salient under the Georgia statute. Under Georgia law, the jury has unfettered discretion to recommend a life sentence even if multiple factors supporting the death penalty exist. Moore v. Balkcom, 716 F.2d 1511, 1521-22 (11th Cir. 1983), cert. denied, 465 U.S.

1084 (1985); see also Coleman v. Kemp, 778 F.2d 1487, 1541 (11th Cir. 1986), cert. denied, 476 U.S. 1164 (1988); Zant v. Stephens, 250 Ga. 97, 297 S.E.2d 1 (1982). Thus, the Eleventh Circuit has stated that "the absolute discretion of a Georgia jury to grant mercy for any reason. . . would make it anomalous to apply the overwhelming evidence concept to the sentencing phase." Coleman, 778 F.2d at 1541 (citation omitted).[10]

Moreover, the facts presented in this case are strikingly similar to the facts presented in Satterwhite. There, as here, the state court's finding of harmless error was based upon other evidence deemed sufficient to support the death sentence. Satterwhite, 108 S.Ct. at 1798-99. There, as here, the testimony in question was offered by the prosecution's final witness and was relevant to the critical issue of future dangerousness. Id. at 1799; see also Skipper, 476 U.S. at 5, 5 n. 1.[11] There, as here, the prosecution explicitly relied upon the testimony's "powerful content" in seeking the death penalty. Satterwhite, 108 S.Ct. at 1799; see also Skipper, 476 U.S. at 5, 5 n. 1; id. at 11 (Powell, J., concurring).

In fact, Chatman's testimony in this case was arguably more important than the testimony at issue in Satterwhite. In Satterwhite, petitioner challenged the admission of a psychiatrist's testimony on the issue of future dangerousness. This Court rejected the Texas Court of Criminal Appeals' conclusion that the introduction of that testimony, although constitutional error, was harmless because there was ample corroborating evidence of Satterwhite's violent nature, including (1) prior convictions for violent crimes; (2) eight

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[10] See also id. at 1540-41 n. 24 ("Georgia's sentencing scheme, which vests absolute discretion to grant mercy for any reason, renders it virtually impossible to apply the harmless error concept to the sentencing phase on the basis of overwhelming evidence").

[11] The importance of the future dangerousness factor in capital sentencing has long been recognized. See, e.g., Jurek v. Texas, 428 U.S. 262, 275 (1976).

police officers' testimony that he had a bad reputation in the community; (3) his former stepfather's testimony that Satterwhite had shot him on a prior occasion; and (4) a psychologist's testimony that he posed a continuing threat of violence.

Here, Chatman was not just one of many prosecution witnesses on the issue of future dangerousness. He was the only prosecution witness in the sentencing phase, and his testimony covered points no other witness addressed.

The prosecution has argued below that the nature of the murder shows that petitioner is violent. That argument misses the mark. Under Satterwhite, the inquiry is not whether other evidence supports the death penalty, but rather whether the prosecution has shown beyond a reasonable doubt that the constitutional error did not contribute to the jury's verdict.

The decision to invoke the death penalty is, by its very nature, a complex matter turning on many logical and emotional factors. The prosecution skillfully crafted Chatman's testimony into a powerful visceral argument that petitioner hated women and would kill again if given the chance. Absent Chatman's testimony, the eight women and four men of the jury might have granted mercy based on petitioner's contention that the murder was an isolated and aberrant occurrence caused by his drug and alcohol abuse. Because Chatman's deal was not revealed, the jury had no reason to doubt his testimony or motive for assisting the prosecution. In light of the unlimited discretion under the Georgia death penalty statute, there is a reasonable doubt whether the jury would have reached the same conclusion had it been aware of the Chatman's motive to free himself by securing the death penalty for petitioner.

The Georgia Supreme Court's analysis of the Giglio issue was directly contrary to Satterwhite because it did not consider the jury's broad discretion as a factor in evaluating

whether the Giglio violation was harmless.[12/] In fact, because Satterwhite was decided four days after this case, the Georgia Supreme Court lacked the benefit of this Court's most recent and pertinent pronouncement on the issue. For this reason alone, the death sentence should be summarily reversed or, at the very least, remanded for further consideration. Moreover, as demonstrated below, the failure to consider the jury's discretion as a factor was compounded by the application of an improper standard and burden of persuasion.

II. THE GEORGIA SUPREME COURT APPLIED AN INCORRECT STANDARD AND BURDEN IN DECIDING THAT THE GIGLIO VIOLATION WAS HARMLESS.

When Chatman denied that he had made any deals with the prosecution, and the prosecution did not correct that testimony, false testimony was introduced into the penalty phase of petitioner's trial. Thus, the Georgia Supreme Court correctly concluded that the jury had been misled, and that a deal had been made which should have been revealed.

However, the Georgia Supreme Court used an incorrect standard to find that this error was harmless. If the use of this incorrect standard and burden was a conscious deviation from the Eleventh Circuit's holdings, a conflict is presented which this Court should resolve. On the other hand, if the use of this incorrect standard and burden was inadvertent error, it should be corrected now rather than after years of needless post-conviction proceedings.

Giglio v. United States, 405 U.S. 150 (1972), requires prosecutors to disclose any agreements reached with witnesses in exchange for their testimony. E.g., Demps v. Wainwright, 805 F.2d 1426, 1432 (11th Cir. 1986), cert. denied, 108 S.Ct.

12/ The Georgia Supreme Court's broad application of the harmless error standard to capital sentencing is also inconsistent with the Eleventh Circuit's view and, thus, presents a conflict this Court should resolve. See Coleman v. Kemp, 778 F.2d 1487, 1541, 1541 n. 24 (11th Cir. 1985), cert. denied, 476 U.S. 1164 (1986).

209 (1987); United States v. Sanfilippo, 564 F.2d 176, 178 (5th Cir. 1977); Boone v. Patrick, 541 F.2d 447 (4th Cir.), cert. denied, 430 U.S. 959 (1976). If a prosecution witness falsely denies such an agreement exists, the prosecution has an affirmative duty to step forward and correct that testimony. E.g., Brown v. Wainwright, 765 F.2d 1457, 1464 (11th Cir. 1986); Williams v. Griswald, 743 F.2d 1533, 1541 (11th Cir. 1984); see also Sanfilippo. 564 F.2d at 178; cf. also United States v. Phillips, 575 F.2d 1265 (9th Cir. 1978), cert. denied, 445 U.S. 863 (1979) (new trial ordered because of undue prosecutorial delay in correcting false testimony).

Giglio followed a long and honorable line of precedent condemning under the Due Process Clause the use of false or misleading testimony in obtaining a conviction or sentence. Giglio, 405 U.S. at 150; Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1935); see also United States v. Bagley, 473 U.S. 667 (1985); United States v. Agurs, 427 U.S. 97 (1976). Jury verdicts obtained through the use of false testimony are subject to reversal "not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process." Agurs, 427 U.S. at 104. Thus, even if it is unclear whether the prosecution has acted in bad faith, see Giglio, 405 U.S. at 154; Napue, 360 U.S. at 269, the "rudimentary demands of justice" require a new sentencing hearing. Id.; see also Brady v. Maryland, 373 U.S. 83, 87 (1963); Mooney, 295 U.S. at 112; Ross v. Heyne, 638 F.2d 979, 986 (7th Cir. 1980); Annunziato v. Manson, 566 F.2d 410, 414 (2d Cir. 1977).

The government's duty to correct false testimony applies to any information it knew or should have known was false. See Giglio, 405 U.S. at 154; United States v. Kaufmann, 803 F.2d 289, 291 (7th Cir. 1986); Brown, 785 F.2d at 1463; Blankenship v. Estelle, 545 F.2d 510 (5th Cir. 1977), cert.

denied, 444 U.S. 856 (1979); United States v. Sutton, 542 F.2d 1239, 1242 (4th Cir. 1976); Dupart v. United States, 541 F.2d 1148 (5th Cir. 1976). Moreover, the duty encompasses not only statements that are perjurious, but also statements that, although technically correct, are seriously misleading. Blankenship, 545 F.2d at 513; Dupart, 541 F.2d at 1150; see also United States v. Iverson, 637 F.2d 799, 805 n.19 (D.C. Cir. 1980). It makes no difference that the false testimony is relevant only to a witness' credibility. E.g., Napue, 360 U.S. at 269.

Petitioner's case is precisely the type to which the Giglio rule applies. Chatman's denial of any deals was false. Thus, the Georgia Supreme Court concluded that the prosecution should have revealed the existence of its agreement with Chatman. The failure to fulfill that duty constitutes a constitutional violation,[11] and the only question is whether that constitutional violation was harmless. In deciding that question, the Georgia Supreme Court failed to follow the Chatman standard, and instead followed the Bagley standard, which is inapplicable to this case. Patillo v. Georgia, 258 Ga. 255, 261 (1988).

Bagley unified the standard for assessing whether the prosecution's failure to disclose exculpatory material requires reversal under Brady v. Maryland, 373 U.S. 83 (1963). Under Bagley, regardless of the specificity of the defense's request,

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[11] The government's failure to reveal that an agreement had been made with Chatman also violated Gardner v. Florida, 430 U.S. 349 (1977), and Delaware v. Van Arsdall, 475 U.S. 673 (1986). Gardner holds that Due Process gives a defendant facing a death sentence the right to attack evidence offered against him. Van Arsdall teaches that an opportunity to challenge a witness' motivation is protected by the Confrontation Clause. Denying access to critical impeachment and cross-examination information impairs these rights. See Skipper v. South Carolina, 476 U.S. 1, 5, 5 n. 7 (1986); see also id. at 11 (Powell, J., concurring). The harm created by the violation in this case is especially strong because Chatman's testimony addressed the critical issue of future dangerousness -- an issue stressed in the prosecution's closing argument. See id.

reversal is required only if the undisclosed evidence is deemed "material." 473 U.S. at 677-84; compare Agurs, 427 U.S. at 103-114 (setting forth the prior three-tier standard). "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of proceeding would have been different." Bagley, 473 U.S. at 682. Bagley places the burden on the defendant to prove the materiality of the undisclosed evidence. See id. at 685 (White, J., concurring); United States v. Jackson, 780 F.2d 1305, 1369 (7th Cir. 1986).

The Bagley standard and burden of persuasion are not, however, applicable to this case, which involves not only a failure to reveal exculpatory evidence, but also involves false testimony at trial. Justice Blackmun's plurality opinion in Bagley makes it clear that that Chapman standard still controls false testimony cases. 473 U.S. at 679-80, 684; id at 706 (Marshall, J., dissenting); id., at 713 n. 6 (Stevens, J., dissenting).

The Chapman standard the Georgia Supreme Court should have applied places the burden upon the prosecution to prove non-materiality "beyond a reasonable doubt":

> the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt.

Id. at 680 (citing Chapman, 386 U.S. at 24); see also id. at 679 n. 9; In re Storer Comm., Inc., 828 F.2d 330, 334 (6th Cir. 1987); Brown, 785 F.2d at 1463; Williams, 743 F.2d at 1543; United States v. Barham, 595 F.2d 231, 242 (5th Cir. 1979); see also Giglio, 405 U.S. at 154.[14/]

By applying the Bagley standard instead of the Chapman standard, the Georgia Supreme Court improperly placed the

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[14/] In Chapman, Justice Black explained that there is no meaningful difference between the harmless error standard enunciated in that case and the "reasonable likelihood" or "reasonable possibility" standard followed in Giglio. 386 U.S. at 24; see also Bagley, 473 U.S. at 679 n. 9.

burden upon the defendant to establish that the Giglio violation was "material" or "harmful." Patillo v. Georgia, 258 Ga. at 261.

Applying the incorrect standard and burden, the Georgia Supreme Court relied upon four basic grounds in finding the Giglio violation harmless: (1) that the agreement with Chatman did not assure that his probation would be reinstated; (2) that Chatman had been impeached on the basis of his criminal record; (3) that Chatman's testimony was corroborated by other testimony; and (4) that Chatman was motivated by factors other than the agreement. These grounds fail to withstand analysis even under the Bagley standard. More importantly, however, they are woefully inadequate under the Chapman standard.

As to the first ground, "Giglio does not require that the word 'promise' is a word of art that must be specifically employed." Brown, 785 F.2d at 1464-65. Instead, "[t]he law is clear that the failure of the government to disclose . . . the existence of any promises, agreements, and understandings made with key witnesses deprives a defendant due process of law." Demps, 805 F.2d at 1432 (emphasis added).

The absence of an unconditional promise to reinstate Chatman's probation is plainly insignificant given the statement in his initial letter offering to testify that, "I realize that you're going to say that the District Attorneys office can't make deals, but I also know why you say that." (NTT at 127.) Thus, even if a binding agreement to reinstate Chatman's probation did not exist, he may well have believed his probation would be reinstated if he provided sufficiently incriminating testimony. Even after Chatman changed his story regarding the deal for the third time, he acknowledged that when he testified at trial he viewed his release as a "possibility." (NTT at 54.)

Indeed, because no "iron-clad" promise was offered to restore his probation, Chatman had an added incentive to be as

helpful as possible. See Boone, 541 F.2d at 451 ("the more uncertain the agreement, the greater the incentive to make the testimony pleasing . . . ."). When he helped the same prosecutors in 1985 by testifying against David McCrary, Chatman believed he "got what [he] asked for." (NTT at 149.) Now, his only hope of release was making certain petitioner was sentenced to death. The jury should have been able to consider these facts. Similarly, the jury should have been apprised of the firm promise made to inform Judge Johnson of Chatman's assistance.

As to the second ground of the Georgia Supreme Court's holding, it is irrelevant that petitioner attempted to impeach Chatman based on his criminal record. Chatman's record might have reflected negatively on his general character, but it did nothing to impeach his motives for testifying against petitioner. "The fact that the history of a witness shows that he might be dishonest does not render cumulative evidence that the prosecution promised immunity for his testimony. A jury may well give great weight to a precise reason to doubt credibility when the witness has been shown to be the kind of person who might perjure himself." Sanfilippo, 564 F.2d at 178.

Because the jury was misled, it had no reason to suspect that Chatman wanted anything other than justice done in this case. The jury was likely impressed by Chatman's willingness to step forward, without the hope of any benefit, and risk the fate of prisoners dubbed "snitches." Had the truth been revealed, petitioner could have argued that Chatman was willing to say whatever it took to get his probation reinstated.[13]

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[13] That variety of impeachment argument carries weight in any case. But it might have been especially powerful in this case because (1) Chatman's initial letter made no reference to petitioner's alleged hatred of women and (2) no other evidence corroborated his testimony on that issue.

As to the third ground -- that Chatman's testimony was cumulative -- it is folly to suggest that the prosecution would have called Chatman as its sole witness in the death sentence phase if his testimony was unimportant. The record verifies the prosecution's judgment on this point.

Testifying that petitioner hated all women, Chatman rebutted petitioner's contentions that he was not violent and that the murder resulted from his being intoxicated. By the same token, Chatman's testimony formed the cornerstone of the prosecution's argument on the issue of future dangerousness. The prosecution cannot now gainsay the value of Chatman's testimony after (1) deciding he was the one witness needed during the sentencing phase; (2) relying on his testimony in closing argument; and (3) stating in a letter to the State Board of Corrections that his testimony was "crucial during the sentencing phase of [petitioner's] trial." (NTT at 134.)[14]

As to the fourth ground -- that Chatman had other reasons for testifying -- the Georgia Supreme Court apparently was swayed by testimony in the motion for new trial hearing that Chatman chose to testify because he was offended by petitioner's crime. Plainly, however, the jury was entitled to decide for itself whether Chatman sought to punish petitioner or profit himself.

Indeed, the latter point underscores that the Georgia Supreme Court's finding of harmless error is contrary to Satterwhite and Giglio. The prosecution's failure to disclose its arrangement with Chatman prevented the jury from considering all evidence relevant to the monumental task of deciding whether petitioner would live or die. Such conduct

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[14] The Georgia Supreme Court expressly approved the trial court's finding that Chatman "added nothing to the case . . . ." Patillo v. State, 258 Ga. 255, 262 (1988). This conclusion wholly ignores the importance of the future dangerousness issue and the dearth of other prosecution evidence on that issue. See Satterwhite v. Texas, 108 S.Ct. 1792, 1798 (1988); Skipper v. South Carolina, 476 U.S. 1, 5, 5 n. 1 (1985).

cannot be lightly disregarded, for "[t]he State's obligation is not to convict, but to see that, so far as possible, truth emerges." Giles v. Maryland, 386 U.S. 66, 98 (1967) (Fortas, J., concurring in judgment).

CONCLUSION

Georgia law allows the imposition of a life sentence, rather than the death penalty, for any reason the jury finds appropriate. Petitioner sought the jury's mercy on the ground that he was not a violent person, had no violent record, and that, despite one violent act committed under the influence of drugs and alcohol, he did not pose a future threat to the safety of others. David Chatman, the prosecution's only witness at the sentencing stage, was offered to contest that plea for mercy and to convince the jury to give the death penalty.

Under these circumstances, it is reasonable to suspect that knowledge of Chatman's deal with the prosecution could have colored the jury's view of his testimony and thus influenced their deliberations. As presented, Chatman's testimony had the ring of truth because he had no apparent reason to lie. He appeared not only disinterested, but also bravely willing to face possible reprisal in prison. In reality Chatman was gambling that, by offering testimony that would send Keith Patillo to the electric chair, he would make a good enough impression to win release from prison on probation. This tactic had worked for Chatman previously, when, in his view, he was released from prison because he testified against David McCrary.

Reasonable doubt plainly exists whether, given all these facts, the jury would have rejected Chatman's testimony in whole or in part and exercised its discretion to sentence petitioner to life in prison. Satterwhite instructs that the jury's discretion is an important factor in harmless error review. Under Giglio, a new sentencing hearing is required

unless, notwithstanding the discretion factor, the prosecution can satisfy the harmless beyond a reasonable doubt test. It cannot.

Accordingly, petitioner's death sentence should be summarily reversed or, at a minimum, remanded for further consideration.

This 21st day of August, 1988.

Gary A. Alexion

88 Walton Street
Atlanta, Georgia 30303
(404) 623-6201

William H. Hughes, Jr.
Randall L. Allen
Todd R. David

Alston & Bird
1200 C&S National Bank Building
35 Broad Street
Atlanta, Georgia 30335
(404) 586-1500

Attorneys for Petitioner

APPENDIX A

DECIDED MAY 26, 1988.

Denial of bond. DeKalb Superior Court. Before Judge Fuller.

Carl P. Greenberg, for appellant.

Robert E. Wilson, District Attorney, Thomas S. Clegg, Assistant District Attorney, for appellee.

45147. PATILLO v. THE STATE.

CLARKE, Presiding Justice.

Keith Patillo was convicted in Bibb County of malice murder and sentenced to death. This is his appeal.[1]

1. The victim, 19-year-old Stephanie McLamb, met Patillo one Sunday afternoon at Central City Park in Macon. He called her a few days later, and he and the victim and her friend Lisa met and spent several hours together, driving around in the defendant's car. Then Patillo stated that he had to meet his brother at eleven, and he dropped Lisa off at her home.

Around midnight, Patillo called his roommate, saying he needed a ride home; his car was stuck. The roommate picked him up at Central City Park. Patillo had blood on his legs and carried a blood-stained baseball bat. He explained that he had been attacked by two men. However, he did not want to call the police or to get his car that night. When he got home, he rinsed off the bat and took a bath.

The next morning, Charles Hamlin went to his okra field in the lower Poplar Street area of Macon, not far from the city's water and sewage treatment facility. A car was stuck in a muddy lane that partly circled the field, and Patillo was trying to get it out. Hamlin used his truck to pull the defendant's car free. Then he noticed some clothing near a "pile of brush . . . beside the ditch on the edge of the field," some 80 feet from where the defendant's car had been. Hamlin went to look, and, under the pile of brush, observed a nearly-nude female body. Patillo denied knowing anything about the body, and

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[1] The defendant was sentenced to death on February 6, 1987. A motion for new trial was filed February 18, 1987, and denied March 23, 1987. The case was docketed in this court May 5, 1987. The defendant filed an extraordinary motion for new trial, and the case was remanded to the trial court for a hearing. The motion was heard August 11, 1987, and denied September 21, 1987. A notice of appeal was duly filed, and the case was redocketed in this court on October 28, 1987. On November 10, 1987, the defendant wrote to the trial court asking that his appeal "be stopped." His letter has been forwarded to this court, and filed with the record on appeal. Notwithstanding the defendant's request, we must review a death penalty case under the United Appeal Procedure (252 Ga. A-13 et seq.) and OCGA § 17-10-35. In conducting our review, we are guided by, but not limited to, the issues raised on behalf of the defendant by his attorneys on appeal. The case was orally argued January 13, 1988.

gave Hamlin a false name. Then he left, and Hamlin called the police.

In the meantime, the victim's mother had called the police when her daughter did not return home the night before. Lisa furnished the police with the defendant's first name, as well as a description of him and his car that matched the information given by Hamlin. Patillo was soon arrested.

He called his roommate from jail and apologized for what he had done, asking him not to "hate him for it." According to the roommate, "[Patillo] said that they had went down and had sex and they got stuck in the car and that she had threatened to call the police and say that he had raped her because he did not get her back home on time and he said, 'I just went berserk, I reckon. . . .'"

Patillo wrote his friend Gary French a letter, explaining what had happened as follows:

> Gary, I am sorry that I Did Knot come clean your house last Friday . . . I Had went off with a Girl and then we got Drunk and I decided that I wanted [to have sex]. to make a long Story short I got [messed] up and stayed out with her for a while Well, it was getting late and She was [complaining] about going Home and she [made me angry]. She kept on [messing] with me, Finley I got Ready to take her Home and the . . . car was stuck. So we decided to Just [have sex] for a while and then worry about the car. Well, we [did], and then we tryed to get the car but went nowhere so She started [complaining] to me and She said that she would just go get the police and tell them I raped her. Well after that she really had me [angry] so I decided that she was not going no where and then I killed her. So I am now in Jail for murder and I don't know when I will get out . . . . [A]s for "*Steve*," tell Him when you see Him that I might be out sooner than I think for pleading insanity and I will be looking for [him] He is next on my *"list"* Because I am sick and tired of everbody [messing] with me . . . . Hope to see you soon. and Don't Forget to tell Steve I am looking For [him] next and I mean that. He is next on the "park killings." tell him He better watch [himself] close because He Just might Have lusaville slugger printed In His Head next . . . .

The letter was signed, "Keith the 'Soko.'" Next to the signature was a drawing of a baseball bat.

The autopsist testified that there were at least 10 major blunt force lacerations about the victim's head, and others that were less severe. He also identified a number of "defensive" wounds on her hands and arms, indicating that she had tried unsuccessfully to ward off the blows to her head.

The evidence, viewed in the light most favorable to the state, is sufficient to convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt of the offense of malice murder. *Jackson v. Virginia*, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

2. Patillo was not charged with the offense of rape. However, sperm and seminal fluid were found in the victim's vagina, and the defendant admitted having sexual intercourse with her. The defendant cross-examined state's witnesses concerning whether a blanket had been found in his car and whether the victim's clothing had been torn, in an effort to support his theory that he was guilty only of voluntary manslaughter, i.e., that he and the victim had engaged in consensual sex but that, when she became concerned that she was going to be very late getting home and left, threatening to explain her lateness by claiming that Patillo had raped her, he flew into a rage and killed her. In these circumstances, the state did not err by arguing to the jury that it was a more plausible inference from the evidence that the defendant had raped and killed the victim and then got stuck in the mud some 80 feet away as he was trying to leave than that he and the victim had engaged in consensual sex in a mosquito-infested swamp or that the victim, with no inkling of possible danger, had attempted to leave the scene of her tryst with almost no clothes on. Compare *Lipham v. State*, 257 Ga. 808 (1 a) (364 SE2d 840) (1988); *Tucker v. Kemp*, 762 F2d 1480, 1506-07 (11th Cir. 1985).

3. On the Thursday before the trial began on Monday, the defendant moved for a continuance. His psychologist (retained with funds provided by the court) had administered certain psychological tests, including the Minnesota Multiphasic Personality Inventory, and had submitted them for a computer-assisted tabulation and analysis. She had not yet received the results; when she did, she would need "several hours" to review them.

The court denied the motion for continuance, stating, however, that

> [i]f after the voir dire process . . . Dr. Cleveland needs additional time . . . whatever time you all need to confer with her to be prepared for trial will be no problem at all . . . if you can show me that that would be of benefit to Mr. Patillo. But given . . . the time we have spent preparing for trial, the court feels comfortable in denying the motion for continuance.

The guilt phase of the trial concluded with the jury's verdict just before lunchtime on Friday. The court asked the defendant's lead attorney if he would be ready to proceed with the sentencing phase of

the trial at 3:00 p.m. He answered in the affirmative, and the defendant's psychologist testified that evening.

There was no abuse of discretion in the denial of a continuance. *Ealy v. State*, 251 Ga. 426 (3) (306 SE2d 275) (1983).

4. In *Giglio v. United States*, 405 U. S. 150 (92 SC 763, 31 LE2d 104) (1972), the U. S. Supreme Court held that where the credibility of a prosecution witness is an important issue in the case, "evidence of any understanding or agreement" with that witness "for prosecutorial leniency" is relevant to the credibility of the witness, and should be disclosed to the defense. 405 U. S. at 151 and 155. The defendant claims the state failed to reveal to the defense that it had agreed to assist a convicted felon in exchange for his testimony, notwithstanding a defense *Giglio* motion explicitly requesting the disclosure of any such agreements. Resolution of this claim of error requires a consideration of the circumstances surrounding the pre- and post-trial discussions between the witness and the state and, as well, the evidence presented at the sentencing phase of the trial. In part (a), below, we summarize the relevant sentencing-phase evidence. In part (b), we set forth the evidence presented at the hearing on the extraordinary motion for new trial, and in part (c) we explain why we do not find reversible error.

(a) David Chatman was the state's only witness at the sentencing phase of the trial. He had a prior record of conviction for theft by deception and forgery, and was in jail because his probation was revoked. After revealing to the jury Chatman's criminal record and the reason for his incarceration, the state asked him if he had "made . . . any deals" in exchange for his testimony in this case. His answer was "no."

Chatman then testified that he had talked to Patillo in jail and that Patillo had explained his crime as follows:

> He said that he was supposed to have her home at 12:30 and after he got his car stuck in the mud and he was trying to get her to calm down and she was fussing at him and she said she was going to . . . tell her mamma that he had raped her and he said that was the reason he lost his temper and he killed her.

Chatman further testified that Patillo had told him that

> he hated women. . . . [W]hen he was small his stepmother . . . turned his daddy against him . . . [T]hey adopted a little girl . . . [and] wouldn't let him stay with them anymore. . . .

Chatman described an incident in which the stepmother had tried to embarrass the defendant, and testified that Patillo had explained his feelings on the night of the murder thusly:

> [Patillo] said he just had nothing in him but hatred from constant hostility that he had had I reckon since he was young, things, you know that he was going through with his stepmother. He said at that particular time, that particular night, he said if anybody would have walked up on him, he probably would have killed them, too. . . . [H]e said [his stepmother] was lucky that he hadn't done something to her because he hated her.

Patillo's mitigation witnesses included several former foster parents, a psychologist, and some friends. According to his own witnesses, the defendant's original home life was violent. His parents fought a lot, and he was placed in permanent foster care when he was six years old. His mother visited him only one time, "promised a bunch of stuff," and never returned. When he was 14 or 15, he went to live with his father and stepmother. However, his stepmother disliked him and his father physically abused him, and he was soon removed from the home and returned to foster care. The psychologist testified that the defendant lacked self-confidence, depended on others, and was angry, hostile, and anxious.

(b) Chatman's probation was revoked on December 18, 1986.[1] On January 9, 1987, the trial judge in this case granted Patillo's motion to exclude his written statement to law enforcement officers. See *Edwards v. Arizona*, 451 U. S. 477 (101 SC 1880, 68 LE2d 378) (1981). Five days later, assistant district attorney Robin Odom received a letter from Chatman stating, in part: "I've had the chance to talk with Keith Patillo [about] . . . his case . . . and since the state can't use his own signed confession against him, I will testify in court to what he told me."

Chatman did testify, claiming at trial that there had been no "deals" in exchange for his testimony. After the trial, however, and after he was transferred from jail to the penitentiary in Jackson to serve his sentence, he wrote a series of letters to the district attorney in which he claimed that he had been promised that his probation would be reinstated if he testified and that, since the state had not lived up to its end of the agreement, he was going to "blow a whistle" and cause a "mistrial" in Patillo's case. He feared for his life if he remained in Jackson, because some of his fellow prisoners knew he was a "snitch." The district attorney notified Patillo's attorneys that Chatman was now claiming there had been a "deal," and they filed an

[1] The judge who presided over Patillo's trial was not the judge who revoked Chatman's probation.

extraordinary motion for new trial that was heard on August 11, 1987. Chatman and assistant district attorneys Odom and Adams testified at this hearing.

Chatman explained that the letters had been prompted by his fear for his life, and the truth was that, although he had sought from the state a promise to get his probation reinstated if he testified, the state had refused to make such a promise. However, the evidence shows that although the state was unwilling to promise that his probation would *be* reinstated, or even that the state would *recommend* that it should be reinstated, the two assistant district attorneys *did* agree that if Chatman testified they would tell the judge who had revoked Chatman's probation of Chatman's favorable testimony in the Patillo case, and, without making a recommendation one way or the other, would leave it to the judge whether or not to reinstate his probation. Chatman was warned that, in view of his record, his probation probably would not be reinstated.

Ultimately, the judge declined to reinstate Chatman's probation, but he did write a letter to the Department of Corrections, explaining Chatman's cooperation and assistance in the Patillo case, and asking for "consideration," specifically, that Chatman be allowed to serve his sentence at the Ware County Correctional Institute rather than in "the mainstream of the Georgia State Prison System, [where] his life would be in jeopardy." In accordance with this recommendation, Chatman finally was transferred to the Ware County facility, after he wrote his series of post-trial letters, but before he testified at the hearing on the extraordinary motion for new trial.

(c) The state argues that its agreement only to inform the judge of Chatman's cooperation, and not to make any recommendation of leniency, is not the kind of understanding or agreement that must be revealed under *Giglio*. The state relies on *McCleskey v. Kemp*, 753 F2d 877 (11th Cir. 1985), in which the 11th Circuit concluded that a police detective's statement to a witness that he would "speak a word" for him "offered such a marginal benefit . . . that it is doubtful it would motivate a reluctant witness, or that disclosure of the statement would have had any effect on his credibility." Id. at 884.

In this case, however, there was more than an offer by a police detective to "speak a word." Although the U. S. Supreme Court "has never provided definitive guidance on when the Government's dealings with a prospective witness so affect the witness' credibility that they must be disclosed at trial," ibid., we agree with the trial judge in this case who, after listening to the evidence, stated:

> It is reasonable for the defendant to contend that the jury and the Court were misled when Chatman testified that no deal had been offered him to get him to testify. Further, the state should have revealed the agreement no matter how non-promising the agreement was in terms of its prospects for the witness.

Order Denying Defendant's Extraordinary Motion For New Trial, Record at p. 78.

However, a failure to disclose does not "automatically require a new trial. . . ." *Giglio*, supra, 405 U. S. at 154. Rather, reversal is required "only if the [undisclosed] evidence is material in the sense that its suppression undermines confidence in the outcome of the trial," i.e., "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, ___ U. S. ___ (105 SC 3375, 3381 and 3384, 87 LE2d 481) (1985).

If the agreement in this case had been disclosed, Chatman would still have been allowed to testify. The question of harm depends upon the likelihood that the disclosure of the agreement "would have affected the jury's assessment of [Chatman's] credibility." *McCleskey v. Kemp*, supra at 884. We agree with the trial court's evaluation of this issue:

> [T]he prosecutors' failure to disclose . . . was harmless error in this case . . . for the following reasons:
>
> (a) The agreement was of a non-promising nature;
>
> (b) The witness was otherwise impeached by revelation of his own criminal record:
>
> (c) The relevant facts testified to by the witness were corroborated by other credible testimony. . . .
>
> (d) The witness' testimony in the end was motivated by factors other than the hope of leniency as a result of the representations made by the prosecutors;
>
> (e) It is significant that the prosecutors told the witness what would not happen if he testified:
>
> 1. They would make no recommendations of leniency;
>
> 2. The witness should not expect to have his probation reinstated because of his bad record;
>
> (f) The witness had no pending criminal case;
>
> (g) No representations were made regarding possible parole

for the witness.

> It is this Court's opinion that the jury in this case returned a verdict recommending the death penalty for the Defendant because of the brutal nature in which he murdered the victim and the post-murder statements the Defendant made in writing that showed an abandoned and malignant heart. In retrospect, the State would have been better served if [it] had not called David Chatman as a witness since he added nothing to the case, and his presence at trial and subsequent actions have only served to delay appropriate appellate review of Defendant's case. As this case graphically illustrates, a prisoner should not be called as a witness except in extreme circumstances. This was not one of those occasions.

Order Denying Defendant's Extraordinary Motion For New Trial, Record at p. 79-80. (Citations to the trial transcript omitted.)

5. Bombastic argument is not unconstitutional. *Spivey v. State*, 253 Ga. 187, 191 (4) (319 SE2d 420) (1984). A prosecutor is entitled to argue his case vigorously, so long as he talks about matters he is entitled to talk about. See *Conner v. State*, 251 Ga. 113 (5) (303 SE2d 266) (1983); *Walker v. State*, 254 Ga. 149 (14) (327 SE2d 475) (1985); *Brooks v. Kemp*, 762 F2d 1383, 1406 (11th Cir. 1985). Compare *Williams v. State*, 254 Ga. 506 (3) (330 SE2d 353) (1985). The defendant did not timely object to the state's closing argument, and having reviewed the record, as supplemented, we find no error. *Hicks v. State*, 256 Ga. 715 (23) (352 SE2d 762) (1987). Compare *Julius v. Johnson*, ___ F2d ___ (11th Cir. No. 86-7589, decided March 9, 1988).

Sentence Review

6. The jury found the presence of two statutory aggravating circumstances: (1) "The offense of murder . . . was committed while the offender . . . was engaged in the commission of aggravated battery"; and (2) "The offense of murder . . . was outrageously and wantonly vile, horrible, and inhuman in that it involved depravity of mind and an aggravated battery to the victim. . . ." See OCGA §§ 17-10-30 (b) (2) and (b) (7).

The defendant contends that these findings are not supported by the evidence. We do not agree.

The defendant struck the victim at least 10 times with his baseball bat. Her hands were injured when she tried to ward off the blows; in fact, part of one finger was torn off from one of the blows and the missing piece, its fingernail still intact, was discovered a few feet from the body. She was struck on her forehead, her left eye, her mouth, her right ear, and all over the back of her head. Her skull was fractured, and her scalp was separated from her skull. Death occurred "somewhere between . . . 5 and 30 minutes" after the attack, as a consequence of "subdural and subarachnoid hemorrhaging."

The evidence supports the jury's findings. OCGA § 17-10-35 (c) (2). Compare *Housel v. State*, 257 Ga. 115 (355 SE2d 651) (1987).

7. The defendant's death sentence was not imposed as a result of passion, prejudice or other arbitrary factor. OCGA § 17-10-35 (c) (1).

8. The sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. OCGA § 17-10-35 (c) (3). The similar cases listed in the Appendix support the imposition of a death penalty in this case.

Judgment affirmed. All the Justices concur.

DECIDED MAY 27, 1988.

Murder. Bibb Superior Court. Before Judge Wilcox.

Alvin C. McDougald, for appellant.

Willis B. Sparks III, District Attorney, Virgil L. Adams, Assistant District Attorney, Michael J. Bowers, Attorney General, Eddie Snelling, Jr., Assistant Attorney General, for appellee.

APPENDIX.

Housel v. State, 257 Ga. 115 (355 SE2d 651) (1987); *Hance v. State*, 254 Ga. 575 (332 SE2d 287) (1985); *Allen v. State*, 253 Ga. 390 (321 SE2d 710) (1984); *Finney v. State*, 253 Ga. 346 (320 SE2d 147) (1984); *Conner v. State*, 251 Ga. 113 (303 SE2d 266) (1983); *Williams v. State*, 250 Ga. 553 (300 SE2d 301) (1983); *Mathis v. State*, 249 Ga. 454 (291 SE2d 489) (1982); *Smith v. State*, 249 Ga. 228 (290 SE2d 43) (1982); *Cunningham v. State*, 248 Ga. 558 (284 SE2d 390) (1981); *Cervi v. State*, 248 Ga. 325 (282 SE2d 629) (1981); *Cape v. State*, 246 Ga. 520 (272 SE2d 437) (1980); *Young v. State*, 239 Ga. 53 (236 SE2d 1) (1977).

45285. UNION CAMP CORPORATION et al. v. HELMY.

MARSHALL, Chief Justice.

This case is here upon a certified question concerning a proposition of Georgia law from a three-judge panel of the United States Court of Appeals for the Eleventh Circuit. See Art. VI, Sec. VI, Par. IV of the Georgia Constitution of 1983.

The statement of facts contained in the federal appellate court's

APPENDIX B

Supreme Court of the United States

No. A88-40

Keith Pattillo,

Applicant

v.

Georgia

ORDER

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including August 25, 1988.

s/ William H. Rehnquist
Chief Justice of the United States

Dated this 19th
day of July, 1988.

APPENDIX C

MR. ADAMS: Opening statements, Your Honor?

THE COURT: I don't know that the rules allow for an opening statement. I don't find that. I think at this time if you want to offer any evidence, you can, but unless the defendant excepts or objects to the Court ruling, there will be no opening statement.

MR. McDOUGALD: That's my understanding of the law, Your Honor.

THE COURT: All right. That's fine. Additional evidence then will be presented at this time.

MRS. ODOM: Call David Chapman.

THE COURT: David Chapman.

(Witness set up for examination)

Whereupon,

DAVID CHAPMAN
having first been duly sworn
testified on

DIRECT EXAMINATION

BY MRS. ODOM:

Q State your name.

A David Lamar Chapman.

Q What is your occupation, Mr. Chapman?

A I drive a tractor-trailer.

Q What is your address?
A At present?
Q At present.
A Jones County Jail.
Q Okay. During the past few months have you spent time in the Bibb County Jail?
A Yes, ma'am.
Q For what reason were you in the Bibb County Jail?
A Violation of probation, theft by deception.
Q Have you been sentenced on that?
A Yes, ma'am.
Q Do you have a criminal record, Mr. Chapman?
A Yes, ma'am.
Q What is that record?
A I've been arrested for violation of probation and theft by deception and forgery.
Q Has the state made you any deals to get you to testify in this case?
A No, ma'am.
Q While you were in the Bibb County Jail, Mr. Chapman, did you have occasion to meet the defendant in this case, Keith Patillo?
A Yes, I did.
Q Were you housed on the same cell block?
A Yes.

Q Did you and Keith Patillo ever engage in conversation
A Yes, ma'am.
Q Did he tell you about the offense for which he was locked up at the time?
A Yes.
Q Did he ever tell you he had killed someone?
A Yes, ma'am.
Q Did he tell you whether or not he had killed a man or a woman?
A He said he killed a woman.
Q Did he ever tell you how he felt about women in genera
A Yes, ma'am. He said he hated women.
Q Did he say anything else about that?
A You mean as to the reason he hated them?
Q That's correct.
A Yes, ma'am. He said when he was small his step-mother, I guess his father was married twice, and his step-mamma turned his daddy against him. She sent him off to a school in Alabama and while he was gone they adopted a little girl by the name of Donna and he said that his stepmother talked his daddy against him. He wouldn't let him stay with them anymore and they, you know, showed the little girl, Donna, more attention than they did him, and on one occasion he said that he had some pornography material in the restroom and some friends and relatives was over there and his stepmother brought

the material out and she was trying to embarrass him and he said, you know, he hated her for that.

Q Did he ever say anything about the victim in this case?

A Yes, ma'am.

Q Did he tell you why he killed her?

A He said that he was supposed to have her home at 12:30 and after he got his car stuck in the mud and he was trying to get her to calm down and she was fussing at him and said she was going to have him -- you know, tell her mamma that he had raped her and he said that was the reason he lost his temper and he killed her.

Q Did he ever tell you the name of this lady he killed?

A Yes, ma'am. Stephanie McLamb.

Q Did he ever tell you what his feelings were that night when he killed Stephanie?

A He said he just had nothing in him but hatred from constant hostility that he had had I reckon since he was young, things, you know, that he was going through with his stepmother. He said at that particular time, that particular night, he said if anybody would have walked up on him, he probably would have killed them too.

Q Did he ever mention anything else to you about his stepmother?

A He said that she was lucky that he hadn't done

something to her. He had cut, you know, four of her car tires at one time because she cut his bicycle tire or somethin but he said she was lucky that he hadn't done something to her because he hated her.

MRS. ODOM: No further questions. He's with you, Mr. McDougald.

CROSS EXAMINATION

BY MR. McDOUGALD:

Q Mr. Chapman, I believe you indicated that you had been convicted of theft by deception?

A That's right.

Q That means that you've been convicted of deceiving people; is that right?

A That's right.

Q You've also been convicted of forgery?

A That's true.

Q That means that you've forged other people's names on documents?

A That's right.

Q You were in the same cell block with Keith Patillo?

A That's right.

Q And where are you located now?

A I'm in Jones County Jail.

Q Do you remember Keith Patillo saying that, "That night the girl was trying to get me" -- "She was trying to accuse me

of something that I know I did not do and that's when I hit her." Do you remember him saying that?

A He told me that after the girl, you know, was arguing back at him, what it amounted to after he got his car stuck, he was trying to get his car out of the hole where he could take her home and while he was doing that, the girl, I guess, must have got in a -- You know, started fussing at him and he say he was trying to talk with her but she wouldn't listen so --

Q He was trying to get his car unstuck at that particular time, according to what he told you?

A Right.

Q And she wouldn't listen and what happened now?

A He said he lost -- He flipped out. Those were the words he used, he said he flipped out.

Q He said he flipped out. That means, that psychologi statement, flipped out, means that he lost control. Is that what he indicated to you, he lost control?

A To me from my opinion I think he meant he got angry.

Q Okay. But he said -- He used the words "flipped out" though, the best you can remember?

A Right.

Q And do you remember him saying, "She was trying to get me in trouble for something that I did not do?"

A I don't remember him telling me that.

Q You made a statement to the district attorney, didn't you about what you testified to, didn't you?

A That's right.

Q Let me show you something to refresh your memory.

A All right.

Q Now, do you remember?

A I remember he told me like this here. He said that the girl was going to tell her mamma that he had raped her and he said he wasn't going back to jail for nothing no more.

Q Well, now, that's not what I asked you. What I ask though, do you remember, you just said you remember this, and you're adding a little bit more as you go, aren't you?

A Well, I'm telling you like he told me.

Q Well, I want you to do this. Do you remember him saying that night the girl was trying to get me in trouble for something I did not do? Do you remember him saying that, according to what you told the district attorney?

A Well, he said he didn't do it, but he said -- He said -- He said that the girl was accusing him of raping her.

Q All right.

A That's what he told me.

Q Okay. Now, what else have you been convicted of besides those two?

A DUI.

Q How many times?

A Once.

Q How long have you got to be in jail?

A 34 months.

Q You're having to be in here 34 months for DUI now?

A No. I'm in jail for theft by deception and violatio of probation.

Q Who did you deceive on that instance?

A Who did --

Q Who did you deceive?

A This was a grocery store.

Q You deceived a grocery store?

A Right.

Q He said he flipped out? The best you can remember those words were his about the flipping out part; is that correct?

A That's what he told me.

Q And, certainly, you don't anticipate your testimony being any help to you in Jones County, do you? Is that a Jones County case?

A It's a Bibb County case, this here.

Q Sir?

A This is a Bibb County case.

Q A Bibb County case?

A Right.

Q When did you make this relevation known to the district attorney's office?

A It was sometime in February, I mean in January.

Q About two weeks ago, wasn't it?

A No. It was about, I'd say, the second week in February.

Q About three weeks ago?

A Right.

Q When did he make this statement to you?

A I guess it might have been around the last of December or the first of January.

Q How long have you been in Jones County?

A About two weeks today.

Q You've been in Jones County two weeks today?

A Right.

Q When did you get transferred to Jones County? Do you remember exactly?

A The 23rd of January.

Q When did Keith Patillo say this to you the best you can remember?

A I'd say it was around maybe the 8th of January. He had been talking about it in December.

Q The 8th of January?

A Right.

MR. McDOUGALD: That's all I have, Your Honor.

MRS. ODOM: Just a few follow-up questions.

CROSS EXAMINATION

BY MRS. ODOM:

Q Mr. Chapman, you stated that Keith Patillo said that he'd gone to jail for nothing before?

A Yes, ma'am.

Q Did he say anything to you about the next time he went to jail?

A He told me --

MR. McDOUGALD: Your Honor --

A -- that he was in Clayton County Jail.

THE COURT: Just a moment.

A He said that --

THE COURT: Just a moment, Mr. Chapman. Excuse me.

MR. McDOUGALD: I'll make my motion after he finishes testifying.

THE COURT: All right.

THE WITNESS: He said that when he was in the Clayton County Jail, he made up his mind when he was up there that hewasn't going back to jail for nothing no more. So he said this time he went back for something.

MRS. ODOM: For something? No more questions.

THE COURT: You may come down, Mr. Chapman.

MR. McDOUGALD: I have a motion to make, Your Honor.

THE COURT: All right, sir. What is it?

MR. McDOUGALD: A motion for mistrial on the death penalty phase.

THE COURT: All right. I take it it has to do with his revealing --

MR. McDOUGALD: (Nodding affirmatively)

THE COURT: The state's response is?

MRS. ODOM: The response is that I'm about to tender into evidence certified copies of some documents.

MR. McDOUGALD: I'm talking about the statement that was given to me by the state.

THE COURT: Oh, I see. The timelyness of the state?

MR. McDOUGALD: Yes. That's the first time I've heard about that statement. I've gotten a copy of the statement that was given.

THE COURT: I see. All right. Fine.

Ladies and gentlemen, we'll just let y'all step right out in the hall here for just a moment please.

(Whereupon, the jury retired from the courtroom at 3:15 p.m.)

THE COURT: Mr. McDougald.

MR. McDOUGALD: Your Honor, the state is required to give notice of any statements made by the defendant. The did supply with that except I'll give the Court my notice of statement made by Mr. Chapman. There's no notification of any idea of anything about Clayton County or about jail or anything along that line, Your Honor. I had no prior -- The state alleges in there specifically as to statements made by Mr. Patillo to Mr. Chapman.

We filed a Walraven notice. They did not put in their statement anything about any -- They complied with everything else except about the statement in Clayton County, which they did not comply with the section insofar as giving us notice of that, Your Honor, and we would move to restrict the state from giving the death penalty based on that.

THE COURT: Mrs. Odom.

MR. ADAMS: Your Honor, the defense was provided with summary, an oral summary, of the statements of Mr Chapman. There was no written statement. He was provided with a summary of that oral statement.

The follow-up question by Mrs. Odom was the result of a question asked by the defense and that question was merely a follow-up, a clarification of the question asked of Mr. Chapman when he said that the defendant told him that he wasn't going to jail for nothing.

The defense was put on notice about the defendants's previous incarceration in Clayton County. He was put on notice about the prior convictions coming from Clayton County.

MR. McDOUGALD: No question about the prior notice of Clayton County. The statement, if the court reporter wants to read it back, he made that statement on direct about the Clayton County -- He said he wasn't going back to jail for anything in Clayton County.

So that statement that statement that was given to me, an oral summary, there's no mention about anything about Clayton County about him not going back to jail or anything.

THE COURT: All right. Please bring the

jury back in.

I would overrule the motion, but I would certainly instruct the jury to not consider that statement.

(Whereupon, the jury returned to the courtroom at 3:17 p.m.)

MR. McDOUGALD: Thank you, Your Honor.

THE COURT: Ladies and gentlemen, let me give you this instruction. You will remember the last question that was asked by Mrs. Odom to the witness, Mr. Chapman, had something to do with the effect of was there anything else he told him. At that point in time, Mr. Chapman had something to say, as I recall and you'll recall it to the best of your memory, that he alleged that Mr. Patillo had said something to him about being in jail in Clayton County, Georgia, and he wasn't going back to jail again for nothing, something to that effect. You'll remember exactly what was said. It was improper for Mrs. Odom to ask that question of Mr. Chapman and it was improper for Mr. Chapman to reveal that to you. So I'm going to say to you at this time, I want you to completely disabuse your minds of that question and that statement, that is that response from Mr. Chapman, and I want to make very